Chicago-Kent College of Law
Scholarly Commons @ IIT Chicago-Kent College of Law

The Illinois Public Employee Relations Report | Institute for Law and the Workplace

Winter 1989

Vol. 6, No. 1

Randi Hammer Abramsky
Illinois Educational Labor Relations Board

Hans DeKok
Illinois State Labor Relations Board

Follow this and additional works at: https://scholarship.kentlaw.iit.edu/iperr

 Part of the Labor and Employment Law Commons

Recommended Citation

Abramsky, Randi Hammer and DeKok, Hans, "Vol. 6, No. 1" (1989). *The Illinois Public Employee Relations Report*. 6.
https://scholarship.kentlaw.iit.edu/iperr/6

This Book is brought to you for free and open access by the Institute for Law and the Workplace at Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in The Illinois Public Employee Relations Report by an authorized administrator of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact jwenger@kentlaw.iit.edu, ebarney@kentlaw.iit.edu.

THE ILLINOIS PUBLIC EMPLOYEE RELATIONS REPORT

Institute of Labor and Industrial Relations — University of Illinois at Urbana–Champaign

Winter 1989/Vol. 6, No. 1

Review of Arbitration Awards under the Illinois Public Labor Relations Act: A Look at AFSCME v. Department of Mental Health

Randi Hammer Abramsky

Randi Hammer Abramsky has been a member of the Illinois Educational Labor Relations Board since May 1988. Before that time, she served as the board's General Counsel. Ms. Abramsky is also an adjunct instructor at De Paul College of Law and IIT Kent College of Law and is a member of the labor arbitration panel of the Federal Mediation & Conciliation Service. She has a B.S. degree from Cornell University, New York State School of Industrial and Labor Relations and a J.D. degree from the University of Pennsylvania.

For more than twenty-five years, national labor policy has strongly favored labor arbitration in the private sector. That policy recognizes that "[a] major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement." *United Steelworkers of America - v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). It also recognizes that, for labor arbitration to achieve its intended purpose, review of arbitration awards by the courts must be very limited, even when the award is claimed to violate "public policy." *United Steelworkers of America - v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *W.R. Grace & Co. v. Local Union 459*, 461 U.S. 757 (1983); *United Paperworkers Union v. Misco, Inc.*, 484 U.S. -, 98 L.Ed. 2d 286 (1987)

Now, in Illinois, with the passage of the Illinois Public Labor Relations Act (IPLRA), Ill. Rev. Stat. 1987, ch. 48, par. 1601 *et seq.*, a similar role for labor arbitration has been statutorily created. Under this law, arbitration plays a major role in the resolution of labor disputes. But this change in the law creates an important question: How will the courts respond to the new policy and what role will the judiciary play in the arbitration process?

INSIDE REPORT

Recently, in *American Federation of State, County, and Municipal Employees v. State of Illinois, Department of Mental Health*, Ill.2d, N.E.2d (1988), the Illinois Supreme Court addressed these questions. It strongly limited the scope of judicial review of arbitration awards and significantly narrowed the public policy exception to enforcement of arbitration awards. This article will first discuss the Illinois Supreme Court's holding in this important case and then explore some of its implications for public sector arbitration under the IPLRA.

AFSCME v. Department of Mental Health

The facts in this case were not in dispute. The grievants, two mental health technicians, were employed by the Department of Mental Health at the Howe Developmental Center, a facility that provides care and treatment for profoundly mentally retarded patients. The grievants had been exemplary employees and, before the incident in question, had treated residents of the facility as though they were "family."

But on April 28, 1985, a day that the facility was short-staffed, the grievants had been authorized to go to the Jewel Food Store to buy food for an impromptu barbecue for the residents. They spent approximately thirty minutes there. The grievants,

however, did not immediately return to the facility. Instead, they made an unauthorized trip to a local flea market for approximately one hour and fifteen minutes.

During their unauthorized trip to the flea market, a male resident in the south wing died (the grievants had been assigned to a different wing). He had been tied to a toilet seat, with the back of a wheelchair placed in front of him. He fell forward from his tied position, and his neck came to rest on the back of the wheelchair. Although another mental health technician was aware that the patient had been tied to the toilet, his death occurred while he was left unattended. The grievants were subsequently discharged for conduct constituting mistreatment of a service recipient, pursuant to department rules and regulations.

Represented by the American Federation of State, County & Municipal Employees (AFSCME), the grievants challenged the department's discharge decision under the grievance procedure contained in the parties' collective bargaining agreement. The matter was later submitted to arbitration, with the issue to be resolved by the arbitrator stipulated as follows: "Were the grievants discharged for just cause? If not, what is the remedy?"

The arbitrator upheld the grievance and reduced the grievants' discipline from discharge to a four-month suspension without back pay or other benefits. The arbitrator determined that the grievants improperly left their worksite while on pay status while the facility was short-staffed. Consequently, he found them to be guilty of mistreatment of a service recipient. However, the arbitrator found no direct link between the grievants' unauthorized absence and the patient's unfortunate death. He then recited several mitigating factors, including the grievants' exemplary work record, their remorse and truthfulness at the hearing, and his "conviction that these grievants are able to return to the useful employ of the employer and provide appropriate services to the residents without the likelihood of a repetition of the occurrence of April 28, 1985" (Slip op. at 3, quoting from the arbitration award). On the basis of all of the facts, the arbitrator concluded that the discharge of the grievants was not for "just cause."

When the department refused to comply with the arbitration award, AFSCME brought suit in circuit court to enforce the award, and the department responded by seeking to have it vacated. The circuit court ruled for the department and vacated the award, finding that it violated the public policy of Illinois to protect, not to endanger, mental health patients. The First District Appellate Court reversed and the Department of Mental Health appealed that decision to the Illinois Supreme Court.

In a clear signal to the lower courts, the Illinois Supreme Court unanimously affirmed. The department asserted that Illinois public policy prohibits the reinstatement of employees found to have mistreated the profoundly retarded, and that the arbitrator exceeded his authority by reducing the penalty assessed by management. The court rejected both arguments.

In addressing the latter issue, the Illinois Supreme Court stated that "a court's review of an arbitrator's award is extremely limited . . . [and that] a court must construe an award, if possible, as valid" (Opinion at 4). The court also noted that "[t]he authority of the arbitration award in the case at bar is grounded upon the IPLRA . . ." and cited Section 8 of that Act, which, the court stated, provides that "all grievance disputes must be resolved by final and binding arbitration, unless there is a joint agreement of the employer and the union to the contrary" (Id at 4-5).[1] The court then quoted at length from the seminal private sector case of *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), which included the standard that an arbitration award is "legitimate" "so long as it draws its essence from the collective bargaining agreement" (Id at 5). The court concluded:

> A labor arbitration award must be enforced if the arbitrator acts within the scope of his authority and his award draws its essence from the parties' collective bargaining agreement.

Applying this standard of review, the court quickly dismissed the department's assertions that the arbitrator had no authority to reduce the grievants' punishment of discharge to a suspension, noting that the collective bargaining agreement provided that "discipline" (defined as an oral or written reprimand, suspension, or discharge) could only be imposed for "just cause." The court stated that "[w]hen a collective bargaining agreement does not define what 'just cause' is, it is left to the arbitrator to determine if the grievants were discharged for 'just cause'" (Slip op. at 6).

The court also dismissed the department's assertion that the arbitrator substituted his own judgment for the department's "managerial discretion as to the discipline required to maintain acceptable standards of recipient care" (Slip op. at 6). The court did not agree and determined that the arbitrator had authority to review the penalty imposed by management:

> While it is not the function of an arbitrator to usurp management's right to define quality of service "the fairness of penalties imposed for faulty work may be closely scrutinized by arbitrators." (F. Elkouri & E. Elkouri, *How Arbitration Works* 494 [4th ed. 1985].) Thus, in a discipline case, the arbitrator is not exercising control over the stan-

dards of quality of service; rather, he is simply determining whether the "punishment fits the crime." (Slip op. at 6)

Likewise, the court determined that the arbitrator properly considered mitigating circumstances in reducing the discharge penalty for the grievants' misconduct. The department argued that its own rules, which stated that any employee found guilty of mistreatment of a service recipient "will be subject to discharge," required discharge. The court did not accept that argument, determining instead that the rule authorized but did not mandate the penalty of discharge.

In sum, the court concluded that the arbitration award "drew its essence from the collective bargaining agreement" when the arbitrator found no "just cause" for the grievants' discharge and ordered their reinstatement without back pay. The award, consequently, was fully enforceable under ordinary standards of review.

The court then turned to the department's assertion that the award violated public policy, specifically the public policy favoring the protection and cure of persons with developmental disabilities. This public policy, the department argued, was created by judicial decisions, the Mental Health & Developmental Disabilities Code (Ill. Rev. Stat. 1985, ch. 91 1/2, par. 20102), the Federal Developmentally Disabled Assistance & Bill of Rights Act (42 U.S.C. Sec. 6000 91982), and in the Illinois statute that imposes a felony penalty when direct injury results from the reckless or negligent failure to provide adequate medical or personal care or maintenance of the developmentally disabled (Ill. Rev. Stat. 1985 ch. 38, par. 12-19).

The Illinois Supreme Court again turned to federal private sector precedents for guidance, particularly the United States Supreme Court's decision in *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757 (1983), and *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. - 98 L.Ed. 2d 286 (1987). The court held in *W.R. Grace & Co.* that "the Supreme Court explained that in order to vacate an arbitration award, the contract as *interpreted* by the arbitrator must violate 'some explicit public policy' that is 'well-defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interest'" (Slip op. at 10, emphasis in original). Citing *Misco, Inc.*, the court stated that the Supreme Court "recently reaffirmed that the public policy exception in such cases is extremely narrow. In order to vacate the award of an arbitrator, the violation of public policy must be clearly shown" (Slip op. at 10).

Significantly, the court held that there was more than one "public policy" at stake in this case. While it acknowledges "the important public policy of this State's commitment to compassionate care for the mentally disabled," it recognized that the dispute also "involves the public policy of promoting constructive relationships between public employers and public employees, and the public policy which requires finality in arbitration awards. (See, Ill. Rev. Stat. 1985, Ch. 48, par. 1602)" (Op. at 11). Thus the importance of the IPLRA and the crucial role that arbitration plays in achieving stable labor relations were fully appreciated by the court.

The court then turned to the facts of the case before it and held that the award did not violate Illinois public policy. The court stated:

> The collective-bargaining agreement as interpreted by the arbitrator does not violate any explicit public policy that is well defined and dominant. There is simply no policy that mandates the discharge of all employees found guilty of mistreatment of a service recipient when the arbitrator expressly finds that the grievants were exemplary mental health employees, when punishment has been imposed, and where no nexus exists between the infraction and the patient's tragic death. (Slip op. at 11)

The court acknowledged that a reviewing tribunal may refuse to enforce an award that "requires violation of law," but determined that it "need not measure the arbitrator's award by that standard" since the award did not "even remotely sanction violations of the law" or even approve of the grievants' conduct (Slip op. at 12). Nor was the court prepared to say that the order to reinstate the grievants posed a threat of harm or danger to the public and thereby violated public policy. Under the facts, the court determined that public policy did not mandate that these grievants be discharged, and the award therefore did not contravene public policy.

Implications of AFSCME v. Department of Mental Health

The *AFSCME v. Department of Mental Health* case is significant for public sector arbitration in Illinois. First, it strongly sets forth a very limited scope of review that courts may apply to arbitration awards, recognizing that it is the arbitrator's judgment, not the court's, for which the parties' bargained. Second, it adopts the federal view that the public policy exception to enforcement of arbitration awards is "extremely narrow" and must be based on positive law rather than on "general considerations of supposed public interest." The message to the lower courts and the parties should be clear: Arbitration awards are final and may not be overturned on public policy grounds except where the award violates positive law.

The effect of the court's decision should soundly discourage suits to vacate arbitration awards based on

public policy considerations. Clearly, the decision should reduce the number of suits filed to vacate arbitration awards on this basis. With the possibility of successfully overturning an arbitration award on public policy grounds being limited, employers should be less inclined to bring such suits. This, in turn, will foster the primary goal of labor arbitration — to provide a speedy and final resolution of the parties' contractual disputes. As one commentator has noted:

> There is an inverse relationship between the success of the arbitration system and a liberal scope of judicial review. As the scope of review is expanded to reconsider more and more of the factors previously considered by the arbitrator, the likelihood of the judge reaching a different conclusion increases. As the likelihood of a different conclusion is increased, losing parties will be more inclined to appeal the arbitrator's decision. If the arbitrator's decision is going to be appealed, regardless of the outcome, the advantages of arbitration are lost and the parties would be better off taking their disputes to court in the first place. (Comment, *United States Postal Service v. American Postal Workers*: The Incredible Expanding Public Policy Exception To Arbitration Finality, 21 Willamette L. Rev. 631,632 [1985])

Thus, by limiting the grounds on which arbitration awards may be overturned on public policy considerations, labor arbitration will be better able to fulfill its intended purposes.

The court's decision will also have a salutary effect on the whole collective bargaining process. When the parties know that the promises they make in collective bargaining, which are enforceable exclusively through arbitration, cannot be overturned by a reviewing court on public policy grounds except when the award violates positive law, the parties will make sure they mean what they say in their collective bargaining agreement and will make sure they can live with their agreement. As the Illinois Educational Labor Relations Board observed in *Maine Township High School District No. 207*, 2 PERI 1068, Case No. 85-CA- 0047-C (IELRB Opinion & Order, May 30, 1986):

> Collective bargaining can only serve to promote stability where unions and management accept labor agreements as documents binding in their entirety. Absent such an acceptance, parties to collective bargaining may not approach the bargaining process with the seriousness of purpose prerequisite to meaningful negotiation and may not conform their conduct during the life of a collective bargaining agreement to the agreement's stated provisions. (2 PERI at p. VII-187)

Limited review of arbitration awards as set forth by the Illinois Supreme Court will foster the goals of the IPLRA. Under that law, collective bargaining over "wages, hours and terms and conditions of employment" is declared to be the "public policy" of Illinois, and binding arbitration of contractual disputes is clearly the preferred method of resolving such disputes (Ill. Rev. Stat, ch. 48, par. 1608). Broad review of arbitration awards on public policy grounds would clearly thwart this public policy by leading to judicial nonenforcement of collective bargaining agreements in the name of "public policy." As the Illinois Supreme Court recognized, the case before it did not just involve "the State's commitment to compassionate care for the mentally disabled" (Slip op. at 11). Citing the IPLRA, the court held that it "also involves the public policy of promoting constructive relationships between public employers and public employees, and the public policy which requires finality in arbitration awards" (Id).

Yet the court fully recognized that awards which "require violation of law" cannot stand. In so ruling, the court appeared to focus on two aspects: (1) the "collective bargaining agreement as interpreted by the arbitrator" and (2) the award itself — whether it orders the employer to do something in contravention of the law. Significantly, the court did not focus on whether the underlying conduct violated Illinois law. Rather, the court determined that there is no public policy that mandates the discharge of all employees found guilty of mistreatment of a service recipient. Thus it looked at the collective bargaining agreement, which required "just cause" to discharge an employee — even an employee found guilty of mistreatment of a service recipient — and determined that the collective bargaining agreement, as interpreted by the arbitrator, did not violate any law. Second, it looked at the award, which ordered reinstatement of employees who were found to have mistreated a service recipient, and determined that it did not require the employer to violate any law. Likewise, the award of reinstatement did not pose a threat of danger to the public and thereby violate Illinois law. Clearly, there exist laws in Illinois that prohibit the mistreatment of a service recipient, the underlying conduct involved in this case. But that was not the focus of the court.

By focusing on the collective bargaining agreement, as interpreted by the arbitrator, and on the award itself, rather than on the underlying conduct, the court's decision should provide substantial guidance to the lower courts and the parties. What the focus should be in such disputes has been a source of considerable controversy in the private sector. (See, *Misco, Inc., supra* at n.7, n.12.) The Illinois Supreme Court, by its decision in *AFSCME v. Department of Mental*

Health, appears to have answered this question in Illinois.

Conclusion

In *AFSCME v. Department of Mental Health*, the Illinois Supreme Court, like the United States Supreme Court in the *Steelworkers* cases many years ago, was searching for the proper role of the judiciary in the review of arbitration awards under the IPLRA. Its recognition of the IPLRA and its basic premises — that unresolved labor disputes are injurious to the public and that adequate means, including binding arbitration, are required to minimize such conflicts — are significant. Its limitations on the scope of judicial review and its recognition that more than one public policy was involved in this case clearly bodes well for the future. But just how the lower courts will interpret this important case remains to be seen. The message appears to be clear, but whether it will be heeded, only time will answer. Substantial review of arbitration awards and the public policy exception, in particular, can be enticingly attractive to employers and reviewing tribunals when confronted with an award they wish to vacate. But it is a path that can lead to the undermining of collective bargaining and labor arbitration, as set forth in the IPLRA, unless it is narrowly curtailed.

Note

1. Section 8 of the IPLRA provides as follows: The collective bargaining agreement negotiated between the employer and the exclusive representative shall contain a grievance resolution procedure which shall apply to all employees in the bargaining unit and shall provide for final and binding arbitration of disputes concerning the administration or interpretation of the agreement unless mutually agreed otherwise (P.A. 83-1012, Section 8, eff. July 1, 1984).

Public Sector Fair Representation Claims in Illinois

Hans DeKok

Hans DeKok is an investigator at the Chicago office of the Illinois State Labor Relations Board. A graduate of the University of Illinois at Urbana-Champaign, Institute of Labor and Industrial Relations, he has been employed by the State Labor Relations Board since 1985. Any opinions expressed herein are those of the author and should not be construed as official policy statements of the State Labor Relations Board.

The duty of fair representation is a legal doctrine that imposes an obligation on labor unions to use their role as bargaining representatives with a certain degree of care toward bargaining unit employees. While the union is not expected to satisfy all represented employees at all times, neither can it act in a manner that unfairly disadvantages an individual or a group within the bargaining unit.

The concept of fair representation has its origins in the Supreme Court decision in *Steele v. Louisville and National Railroad*, 323 U.S. 192 (1944). Here, the Brotherhood of Locomotive Firemen and Enginemen had negotiated away the jobs of its black employees in bargaining with the railroad. Those employees filed suit, seeking relief from the union's actions.

The Supreme Court ruled in favor of the employees. Its decision focused upon the fact that the union owed its status as agent of the employees to the terms of the Railway Labor Act. Since the Act gave the union the right to be the exclusive representative of the bargaining unit, there was an attendant obligation to exercise that right properly. Therefore, discrimination based upon "irrelevant and invidious" factors could not be permitted.

While the original fair representation court decisions focused upon discriminatory acts such as those in the *Steele* case, later cases considered other types of union conduct. Eventually this resulted in a considerable number of cases that focused upon a union's obligation to an individual when it pursues a grievance under the contract.

The Supreme Court decision in *Vaca v. Sipes*, 386 U.S. 171 (1967), is generally considered to be the starting point for the current doctrine of fair representation. The issue in *Vaca* was the union's decision not to arbitrate a grievance concerning an employee's discharge. The court found that the union did not breach its duty to represent the employee, as its conduct was not "arbitrary, discriminatory, or in bad faith" (*Vaca, supra* at 190-1).

It seems safe to say that the courts and labor relations agencies have struggled to apply this general statement to specific cases. The result has been the emergence of a variety of standards ranging from "intentional misconduct" to "negligence" on the part of the union.[1]

The passage of the Illinois Educational Labor Relations Act (IELRA) and the Illinois Public Labor Relations Act (IPLRA) has placed public sector labor relations in Illinois under the jurisdiction of the various agencies created by the statutes. Each of these boards has had some opportunity to consider the concept of fair representation, although the caselaw to date represents only the beginning of a definition of a legal standard. The following is a review of the administrative caselaw in the area, as well as a brief mention of court cases that may have some impact on fair representation claims by government employees in Illinois.

Developments under the IELRA

There is no express statutory language setting out a union's duty to fairly represent educational employ-

ees in the text of the Illinois Educational Labor Relations Act, Ill. Rev. Stat. 1987, ch. 48 ¶1701 *et seq.* This is evident from the initial case processed under the Educational Labor Relations Board's unfair labor practice procedures. In *Albert Turcki and Custodial and Maintenance Employees Organization of District 59*, 1 PERI ¶1107 (IL ELRB Exec. Dir. 1985), the executive director implied that this duty did exist under the IELRA. The executive director noted that many collective bargaining laws impose an obligation on labor organizations to fairly represent bargaining unit employees. Under the facts of the case, the executive director dismissed the charge, as there was no evidence to show that the union failed to accept Turcki's grievance or that it did not pursue the matter up to arbitration. While the union did decide not to arbitrate, there was no evidence that this decision was based on factors other than the merits of the grievance.

Upon consideration of the appeal of the executive director's dismissal, the Educational Labor Relations Board's decision, 1 PERI ¶1158 (IL ELRB 1985), also implied that the IELRA imposed a duty of fair representation on unions under its jurisdiction. The board upheld the dismissal on the facts, assuming that the duty did exist. In proceeding with this assumption, the board cited the general standard set out by the U.S. Supreme Court in *Vaca*.

Subsequent cases under the IELRA have been processed under the "arbitrary, discriminatory, or bad faith" standard implied in *Turcki*. In the case of *Leonard Cooke and Custodial Maintenance Association of Township High School District 214*, 3 PERI ¶1064 (IL ELRB Exec. Dir. 1987), the executive director dismissed the charge where a union refused to arbitrate a grievance, as there was no evidence that similar grievances had been handled differently. In upholding the dismissal, the board decision, 3 PERI ¶1121 (IL ELRB 1987), asserts that the grant of exclusive jurisdiction to the union under 3(b) of the Act

> implies a duty to exercise that role in a manner which does not restrain or coerce bargaining unit employees in the exercise of rights guaranteed by the Act. We consider that, by granting educational employees the right to bargain collectively through representatives of their own free choice, Section 3(a) of the Act guaranteed to educational employees the right that their exclusive representative shall not represent them in a manner which is arbitrary, discriminatory or in bad faith. By representing them in an arbitrary, discriminatory or bad faith manner, an exclusive representative violates Section 10(b) (1) of the Act. (footnote omitted)

Another significant facet of the *Cooke* decision is that the board apparently indicated it would consider the *quality* of the union's efforts in deciding a fair representation claim.[2] The board rejected the employee's argument that the union failed to "zealously" pursue his grievance, as he did not show an alternative strategy that would have "enhanced his position." Even though the decision states that "an exclusive representative must be accorded some discretion in the manner of presenting grievances," the board's decision suggests that there are limits to this discretion.

More recent cases that have come before the education board have raised issues concerning other aspects of the union's duty to the members of a bargaining unit. In *Robert Williams and AFSCME Local 2887*, 3 PERI ¶1070 (IL ELRB 1987), the charge raised the issue of a breach in the context of contract negotiations. It was asserted that the union had breached its duty by failing to "pass on" directly all of a 6 percent increase appropriated by the Illinois legislature. (The union and the employer had instead negotiated a 3 percent increase and a supplemental bonus.) In dismissing the charge, the executive director stated that there was no evidence "of any degree of disparate treatment or animus towards him (Williams) on the part of the union" (footnote omitted). Therefore, while the education board will consider a case concerning contract negotiations, it also appears that a union will be given a broad range of discretion in this area.[3]

In a case that may serve to limit the range of activities for which a union may be held liable, the education board dismissed a charge in *Slayton and Public Service Employees Union Local 46*, 3 PERI ¶1104 (IL ELRB 1987), where the issue concerned the union's failure to secure full-time work for the grievant. In upholding the executive director's dismissal, the board relied on the fact that Slayton's claim was not grounded in the collective bargaining agreement. Accordingly, it seems that there must be some connection between the union's obligation as a bargaining representative and the conduct alleged as a breach of the union's duty.[4]

Developments under the IPLRA

In contrast to the IELRA, the Illinois Public Labor Relations Act, Ill. Rev. Stat. 1987, ch. 48 ¶1601 *et seq.*, contains a somewhat clearer statutory mandate for considering fair representation claims by noneducational public sector employees. Besides language in Section 6(c) of the IPLRA, which is virtually identical to that of Section 3(b) of the IELRA, Section 6(d) states that an exclusive representative is "responsible for representing the interests of all public employees in the unit."[5] However, this section also provides that "nothing herein shall be construed to limit an exclusive representative's right to exercise its discretion to refuse to process grievances that are unmeritorious." Accordingly, both the

state and local labor relations boards[6] have processed unfair labor practice charges predicated upon the notion that the language of 6(d) guarantees some standard of fair representation to employees under their jurisdiction, but that unions also retain discretion in contract administration.

Much of the early caselaw under the IPLRA has been developed by the Local Labor Relations Board. The first case in which the board issued a decision was *Poole and Janitors Local Union No. 1*, 1 PERI ¶3005 (IL LLRB 1985). Here the board upheld the executive director's dismissal of an unfair labor practice charge alleging that the union had failed to resolve several pay disputes between Poole and his employer. The board noted that when Poole brought these issues to the attention of the union, grievances were filed, some of which were resolved in his favor. The decision noted that there was no evidence of "arbitrary, unreasonable or bad faith conduct," and that "more than understandable disappointment is required to establish a violation . . . in this context."

The next case considered by the local board was *Diaz and Local 241, Amalgamated Transit Union*, 2 PERI ¶3021 (IL LLRB 1986). Here, Diaz claimed that the union breached its duty by failing to arbitrate his discharge grievance. The local board upheld the executive director's dismissal of the charge, and cited two factors that were persuasive in the disposition of the case. First, there was no evidence to support Diaz's claim that the ATU discriminated against Latinos within the bargaining unit. Second, the board noted that Diaz had failed to avail himself of an internal union process that allowed for membership review of an Executive Board decision not to arbitrate a grievance. While the decision did not state that the failure to use the internal union process was fatal to his claim, the fact that he did not do so was clearly detrimental to his case.

In *Yates and Amalgamated Transit Union, Local 241*, 2 PERI ¶3024 (IL LLRB 1986), the local board again upheld an administrative dismissal of a charge when it agreed with the executive director's determination that the union had not acted discriminatorily, or with hostility, or in bad faith. Here, the issue was the alleged failure of the union to contest a change in bus-cleaning and fueling quotas under the past practice clause contained in the agreement. The board cited the Supreme Court's decision in *Ford Motor Co. v. Huffman, supra*, in support of a finding that the union has discretion in setting priorities in bargaining objectives. Further, it cited *Parker v. B & O RR*, 555 F. Supp. 1177, 112 LRRM 2729, (D.D.C. 1983), in support of its finding that failure to enforce every employee's theory of the contract's provisions does not constitute a breach of the union's duty.

Subsequent cases brought before the local board have primarily concerned the union's decision not to arbitrate grievances.[7] The most significant case in this regard is *Fraternal Order of Police Lodge 7 and Galowitch*, 3 PERI ¶3009 (IL LLRB 1987), which concerned the union's acceptance of a settlement offer to a grievance. The board, besides finding no evidence of hostility, bad faith, or discriminatory intent, also noted that issues raised by the charging party simply were not stated in the grievance. Since the employee had signed the grievance form (thereby attesting that it accurately stated his complaint), the union could not be held totally responsible for any misstatement of the issues. The local board further stated that, even assuming that the union had been negligent in framing the issues or in processing the grievance, such simple negligence was insufficient to state a claim.[8]

Unlike the local board, whose caselaw consists almost entirely of appeals of administrative dismissals, a number of hearing officer decisions have come up through the State Labor Relations Board processes. Until recently, however, the state board has not articulated a specific test to be applied in fair representation cases beyond the threshold set out in *Vaca*. This approach can be seen in the board's opinion in *Roger Sosner and AFSCME Local 1006*, 2 PERI ¶2004 (IL SLRB 1985), where the hearing officer's dismissal of the charge was upheld on the facts presented. The decision noted that the language of *Vaca* has given rise to a number of interpretations and found that *Sosner* had not established a claim under any standard.

In *Durietz and Illinois Nurses Association*, 2 PERI ¶2015 (IL SLRB H.O. 1986), the state board declined to take up on its own motion a charge involving alleged discrimination based on union membership. The hearing officer found an independent violation in a statement to Durietz that she would receive less vigorous representation because she was not a member, but also found that the union did in fact discharge its duty to her in processing the grievance. Once again, no evidence was found of any arbitrary, bad faith, or discriminatory *action* on the part of the union.

However, the state board has recently decided to adopt a "gross negligence" standard that it will henceforth apply to fair representation claims. In *Eugene Mathis and AFSCME*, Case No. S-CB-87-35, ___ PERI ___, (IL SLRB 1988), the board specifically rejected the argument that a union can breach its duty toward unit employees only by intentionally engaging in proscribed conduct. Rather, it also included conduct such as that which is

> perfunctory or grossly negligent, or when it is unable to provide any legitimate or rational explanation for its conduct. While we will not substitute our judgment for that of the union or police every small

> error, we will find a violation when a union, through inadvertence or gross negligence, virtually ignores its members' rights. This is particularly true where a union's wrongful conduct completely extinguishes an employee's right to challenge serious disciplinary actions. (footnotes omitted)

In considering the charge, the board affirmed the hearing officer's dismissal of the case, where the employee had failed to prove the underlying factual basis for his claim. The board decision clearly states, however, that had Mathis's version of the facts been proven, a violation would have been found.

There is now a statement from the state board as to what conduct constitutes a breach of the union's duty. Moreover, by comparison with other jurisdictions, it is a rather liberal standard in terms of employees' rights. It also appears that the state board will look more closely at cases where the stakes are greatest to the employee. In other words, a union may be expected to exercise more care in a discharge case than in one concerning a reprimand.

Development in the Courts

The state courts had, even before the passage of the IPLRA and IELRA, considered fair representation claims relating to public sector employees in Illinois. In *Swieton v. City of Chicago and Local 2 of the International Association of Fire Fighters*, 472 N.E. 2d 503, 129 Ill. App. 3d 379, 1 PERI ¶4010 (1st Dist. 1984), the Appellate Court for the First District considered a claim grounded in a contract clause guaranteeing fair representation to bargaining unit members. The court reversed the district court's dismissal of the suit where the district court had held that Swieton failed to exhaust internal union remedies before filing with the courts. The appellate court found that the internal union process lacked the ability to adequately remedy the alleged harm (i.e., the loss of a job). In reinstating Swieton's claim, the court relied upon the U.S. Supreme Court's reasoning in *Clayton v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America*, 451 U.S. 679 (1981), and stated that "the public policy of Illinois" supported consideration of *Clayton* in this case. The decision also considered *Vaca* and other private sector cases in disposing of other arguments raised by the city and union in response to the appeal.

However, it is a much more recent case that may well prove to be the watershed for some public sector claimants in Illinois. Strictly speaking, *Svoboda v. Illinois Department of Mental Health and Developmental Disabilities*, 515 N.E. 2d 446, 162 Ill. App. 3d 366, 4 PERI ¶4004 (2nd Dist. 1987), is not a fair representation action. Rather, it is a suit to vacate an arbitration award. The plaintiffs had, through the union, exhausted a contractual appeal of their discharges, including arbitration. They then filed suit as individuals, seeking to vacate the arbitration award upholding the discharges. The circuit court dismissed the suit on the grounds that the plaintiffs lacked standing to sue. The appellate court reversed, and in so doing may have opened the door for an independent route to assert contract rights for individuals.

The basis for the decision is the court's construction of Sections 8 and 16 of the IPLRA. Adopting a broad reading of the language of the statute, the court found that the Act allows an individual "to bring a grievance, compel arbitration, receive an award, and seek to vacate an award in circuit court." Further, the court stated that employees *do not* have to allege a breach of the union's duty to represent them in order to have standing to sue in court. The court felt that

> the interests of the individuals are best served by allowing the employee the freedom to both work with the union and to represent him or herself when the union declined to do so. We do not feel that an employee should be deprived of an opportunity to petition a circuit court to vacate an arbitration award solely because he or she sought to work with his or her union in the first instance, and the union declined to further prosecute the action after the arbitration award.

The full impact of *Svoboda* on public sector bargaining relationships governed by the IPLRA is not yet clear. If significant numbers of employees seek to assert claims under this decision, a whole new component to dispute resolution could emerge for some public employees in Illinois. Most importantly for the present discussion, employees need not show a breach of the union's duty before asserting their claims as individuals.

A Look to the Future

Perhaps the first order of business for the public sector boards is to consider the implications of *Mathis*. It seems safe to say that the local board may follow closely to what the state board has already done. This is not so clear for the educational board, given the different statutory language, but the author believes that analysis of subsequent claims, regardless of jurisdiction, will now use *Mathis* as a focal point.

Chief among the unresolved issues is the question of remedy. To date, none of the agencies has found a breach of the union's duty. Accordingly, there is no indication as to what would be appropriate if a breach were found. Related to this issue is the question of whether an employer may

be joined in some fair representation cases (e.g., discharged employees) for the sole purpose of fashioning a remedy.

Other important questions concerning the processing of charges also remain unanswered. For example, should the statutory limitations period of six months be extended while a grievance is in progress or while internal union appeals are pursued? Should an employee be *required* to exhaust those internal processes?

Finally, as suggested above, it remains to be seen what effect, if any, the *Svoboda* decision will have on claims under IPLRA jurisdiction.[9] On the one hand, it may well obviate many such actions, as employees choose to file suit directly against the employer rather than against both union and employer. On the other hand, the shorter limitations period (90 days compared with 180 days for unfair labor practice charges) and increased relative costs of the courts as opposed to administrative agencies may make *Svoboda's* effect negligible.

As public sector jurisdictions continue to organize and the number of collective bargaining agreements increase, it seems likely that a growing number of employees will attempt to assert claims against their unions. One may assume that, with the passage of time, fair representation actions will continue to be filed and that the caselaw will continue to develop. If so, it may well have the impact on public sector bargaining in Illinois that has already been seen in the private sector.

Notes

1. For an outline of these various standards in the federal courts, see M. Malin, *Individual Rights Within the Union*, pp. 357–71, and cases cited therein.

2. Federal courts have also explored this avenue, as one may see in cases such as *Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976). Here, the union's failure to follow up the employee's account of the facts led the court to find a breach of the duty, notwithstanding the fact that the union had pursued the grievance through arbitration. Such an inquiry is a tricky undertaking — when does one cross the line between inferring a motive for a union representative's conduct and second-guessing that representative's judgment?

3. The executive director cited *Ford Motor Company v. Huffman*, 345 U.S. 350 (1953), in support of his position. *Huffman* concerned the propriety of giving seniority credit for time spent in the service to veterans. The Supreme Court, in finding for the union, stated that a "broad range of reasonableness must be allowed . . . subject always to complete good faith and honesty of purpose . . ." (*Huffman, supra*, at 337–338).

4. Such may not always be the case in other jurisdictions, as can be seen in actions involving such issues as providing legal counsel to nonmembers. See, for example, *Barnett and United Federation of Teachers*, 13 NY PERB 4590 (1980), 14 NY PERB 3017 (1981); *Del Casal v. Eastern Air Lines, Inc.*, 465 F.Supp. 1254 (S.D. Fla. 1979) aff'd 634 F.2d 295 (5th Cir. 1981) cert. denied, 50 USLW 3278 (1981).

5. Similar language in other state labor relations Acts has been construed as the basis for establishing an explicit duty to fairly represent employees. See, for example, the laws for public sector employees in Massachusetts and Michigan.

6. The State Labor Relations Board has jurisdiction over noneducational public sector employees, excluding those of the General Assembly, those employed by units of local government whose population is in excess of one million people, and units of local government that employ fewer than 35 public employees. The state board also exercises jurisdiction over the Regional Transportation Authority and units in existence at the time the Act took effect (July 1, 1984, for general employees and January 1, 1986, for police and fire employees). The Local Labor Relations Board has jurisdiction over units of local government with a population in excess of one million persons, excluding the RTA.

7. See, for example, *Parmer and SEIU Local 1*, 3 PERI 3008; *Sullivan and SEIU Local 25*, 3 PERI 3029; *SEIU Local 1 and Robinson*, 3 PERI 3005.

8. This rejection of simple negligence claims has been reaffirmed by the local board in its most recent reported case, *AFSCME and Baugh*, 4 PERI 3003.

9. There are considerable differences between the two Illinois statutes regarding jurisdiction over enforcement of contracts and arbitration awards. The IPLRA follows the private sector scheme of enforcement through the courts. In *American Federation of State, County and Municipal Employees v. State of Illinois, Department of Mental Health, et al.*, ___ PERI ___, 529 N.E. 2d 534, the Illinois Supreme Court showed a clear willingness to adopt that role in considering arbitration awards under the IPLRA. On the other hand, the court found in *Board of Education of Community School District No. 1, Coles County v. Jeffrey Earl Compton*, 4 PERI 4025, 526 N.E. 2d 149, 123 Ill. 2d 216, that the IELRB has primary jurisdiction over contract enforcement cases for educational employees. Therefore, while it appears that an employee under the IELRA must go through the board's processes if she feels wronged by an arbitration award, an employee under the IPLRA may have a choice between the appropriate board and the courts.

FURTHER REFERENCES

Crisci, Pat, and C. Michael Shaddow. "Concessionary Bargaining in Education." *Government Union Review*, vol. 9, no. 4, Fall 1988, pp. 1–39.

The authors argue that the nature and the expanding scope of bargaining in teacher negotiations have resulted in increasing employee control over working conditions and educational policy. They ask whether school district fiscal solvency has been purchased at the price of management rights. Using survey data from school districts in Ohio, their study attempts to evaluate the success of concession bargaining in regaining management rights by examining the nature of non-economic concessions, the reasons for them, and the characteristics of the districts that did and did not achieve them.

———

Dilts, David A., and William J. Walsh. *Collective Bargaining and Impasse Resolution in the Public Sector.* Westport CT: Quorum Books, 1988. 236p.

Intended as a complete reference guide or textbook for the practitioner, this book examines the process of collective bargaining in the public sector and the various impasse resolution methods. Part I, an introduction to collective bargaining in the public sector, discusses the legal environment, the process, and negotiating strategies. Part II is an analysis of preparation for, procedures used in, and rules applied for each of the impasse resolution procedures commonly used — mediation, interest arbitration, fact finding, and experimental procedures — along with an assessment of the effects of impasse resolution on collective bargaining.

———

Dudek and Company. *Privatization and Public Employees: The Impact of City and County Contracting Out on Government Workers.* Washington: National Commission for Employment Policy, 1988. 57p.

After a brief discussion of various privatization strategies, there is a more extensive discussion of the effect of contracting out on government employees. Specifically, attention is focused on the literature pertaining to job displacement resulting from contracting out; the amount of public assistance received by displaced public employees; the effect of contracting out on wages and fringe benefits; differences between contractors and government in their use of labor; the effect of contracting out on minorities and women; and the overall effect of privatization on the labor market. Finally, there is a brief discussion of the experiences of seventeen municipalities that have contracted out services to the private sector.

———

Hundley, Greg. "Who Joins Unions in the Public Sector? The Effects of Individual Characteristics and the Law." *Journal of Labor Research*, vol. 9, no. 4, Fall 1988, pp. 301–323.

Using data from the Current Population Survey, the author attempts to correlate the distribution of public employee union membership with individual characteristics such as race, sex, education; occupational characteristics such as educational requirements, hazardous duty, supervisory responsibilities; and the provisions of state bargaining laws, such as union security, duty to bargain, and impasse procedures. The main explanatory variable is the provisions of state public employee bargaining laws.

———

Karger, Howard Jacob. *Social Workers and Labor Unions.* Westport CT: Greenwood Press, 1988. 195p.

This book is a history of unionism in social work and of the relationship of social workers to the labor movement. After a historical account of union organizing of social workers, the author examines areas in which labor and social workers have both common and conflicting goals — the common goals of raising standards of living and improving social welfare, and the conflicting goals of occupational licensing, reclassification, and social worker attitudes toward unions and collective bargaining. The last part of the book addresses the social worker–union relationship in terms of the legal environment for bargaining, privatization, automation and deskilling, and workplace labor relations.

———

Rose, Winfield H. "Recent Developments in Public Sector Labor Relations Law: The Garcia, Jackson Transit, Bowen, and Chicago Teachers Cases." *Journal of Collective Negotiations in the Public Sector*, vol. 17, no. 3, 1988, pp. 207–219.

This article presents an update on developments, mainly through analysis of Supreme Court decisions, in the areas of (1) passage of a national public employee labor relations act, for which Garcia has cleared a path; (2) the duty of fair representation, which was extended to the federal sector by Bowen; and (3) service fees and the agency shop, where appropriate procedures were defined by Chicago teachers. Implications of these decisions are discussed in the conclusion.

———

Ury, William L., Jeanne M. Brett, and Stephen B. Goldberg. "Designing an Effective Dispute Resolution System." *Negotiations Journal*, vol. 4, no. 4, October 1988, pp. 413–431.

The authors outline six principles crucial to designing an effective dis-

pute resolution system and discuss each, giving examples and case studies of how each works. The article is an adaptation of a chapter from their recent book, *Getting Disputes Resolved.*

(Books and articles annotated in *Further References* can be obtained on interlibrary loan through ILLINET by contacting your local public library or system headquarters.)

The Illinois Public Employee Relations Report provides current, nonadversarial information to those involved or interested in employer-employee relations in public employment. The authors of bylined articles are responsible for the contents and for opinions and conclusions expressed. Readers are encouraged to submit comments on the contents, and to contribute information on developments in public agencies or public-sector labor relations.

The *Report* invites the submission of articles and other editorial matter to Editor, Helen Elkiss, University of Illinois, 815 W. Van Buren #214, Chicago, IL 60607. Manuscripts should be submitted in triplicate, approximately 2,000 words in length and double-spaced. A short biography of the author should be included.

The University of Illinois at Urbana-Champaign is an affirmative action/equal opportunity institution.

Institute of Labor and Industrial Relations
University of Illinois at Urbana-Champaign
504 E. Armory Avenue
Champaign, IL 61820

Non-Profit Org.
U.S. Postage
PAID
Permit No. 75
Champaign, IL 61820

The Illinois Public Employee Relations Report
Published quarterly by:
The Institute of Labor and Industrial Relations
University of Illinois at Urbana-Champaign
504 East Armory
Champaign, IL 61820
Telephone 217 333-1480

Editor: Helen Elkiss, associate professor, Institute of Labor and Industrial Relations. *Editorial Review Board*: Margaret Chaplan, librarian; Peter Feuille, Professor; Walter Franke, director; Michael LeRoy, assistant professor; Martin Wagner, professor emeritus: Institute of Labor and Industrial Relations. *Technical Coordinator*: Alice Vernon. *Assistant to the Editor*: Emily Rosenberg. *Copy Editor*: Sheila Ryan. *Graphic Designer*: Lynn Hawkinson Smith.
Material may be reprinted in whole or in part with appropriate credit to ILIR/*The Illinois Public Employee Relations Report* and authors.

The *Report* Subscription Form (vol. 6:1-4)

The publication of the *Illinois Public Employee Relations Report* reflects the Institute of Labor and Industrial Relations' continuing effort to provide educational services to employers and unions in Illinois.

The *Report* is available by subscription through the Institute of Labor and Industrial Relations at a rate of $25.00 per year for four issues. To subscribe to the *Report*, please complete this form and return it with a check or invoice to:

The *Report*
ILIR
University of Illinois at Urbana-Champaign
504 East Armory
Champaign, IL 61820

____ Please start my subscription to the *Report*.
____ Please renew my subscription to the *Report*.
____ Enclosed is my check payable to the University of Illinois at Urbana-Champaign.

Name _____

Title _____

Organization _____

Address (please give address where the *Report* should be mailed) _____

_____ Tel. _____

Date _____